

Appendix Exhibit 15

United States Department of Justice
Office of the United States Trustee
1100 Commerce Street
Dallas, Texas 75242
(214) 767-1080

Lisa L. Lambert,
For the United States Trustee

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE: §
§
HIGHLAND CAPITAL § **Case No. 19-34054-SGJ**
MANAGEMENT, L.P. §
§
Debtors-in-Possession. § **(Chapter 11)**

**UNITED STATES TRUSTEE'S MOTION FOR AN ORDER DIRECTING
THE APPOINTMENT OF A CHAPTER 11 TRUSTEE**

A hearing will be held on January 21, 2020. The objection and response deadlines will be governed by the Scheduling Order, ECF No. 269. The Court orally denied the U.S. Trustee's request to have this motion considered in connection with any Governance Motion. See Scheduling Order, ECF. No. 269 and transcript.

**TO THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:**

The United States Trustee for Region 6 moves for an order directing the appointment of a Chapter 11 Trustee based on cause and the best interests of the creditors. 11 U.S.C. § 1104(a).

The United States Trustee would show:



Overview

Documented management concerns mandate a trustee in this case. This Court has recognized that Highland's management concerns involve a culture that surpasses the officers and board. Steps such as replacing the board or having a chief restructuring officer who reports to the Court rather do not fix Highland's problems.

Prior efforts to use external oversight to curtail Highland management's self-dealing have failed. As the Acis case demonstrated, the Highland Capital cases have many interconnected relationships. A trustee can nimbly evaluate whether the inter-company transactions are in the best interests of the estate and creditors. In the Acis case, the trustee concluded other options were either superior, cheaper, or less-conflicted. A board is farther from the impact of the related-entity transactions and the culture of the debtor. It meets periodically. Here, the inter-connected relationships include the Debtor's bank as well as other legal entities.

The remedy Congress defined for these facts is a trustee. The Court should direct the appointment of a trustee.

Jurisdiction, Power, and Standing

1. The Court has subject matter jurisdiction under 28 U.S.C. § 1334, 28 U.S.C. § 157(a)(1), and the standing order of reference. Appointing a trustee or examiner impacts the case administration and therefore is a core matter that the Court has the power to resolve. 28 U.S.C. § 157(b)(2)(A).
2. The United States Trustee has standing to seek appointment of a trustee or examiner. 11 U.S.C. §§ 307, 1104.

Facts

The Acis case involved findings of fraud, self-dealing, and mismanagement by this debtor:

3. This Court presided over the Acis bankruptcy case, case number 18-30264. In *Acis*, the Court catalogued the decision-making authority as belonging to James Dondero, as president; Mark K. Akada, chief investment officer with a decreasing role; Frank Waterhouse, as treasurer; and –by delegation of authority – Highland in-house counsel Scott Levington and Isaac Leventon. With the exception of Mark K. Akada, the same individuals have decision-making authority for the debtor-in-possession. *In re Acis Capital Mgmt., Inc.*, 584 B.R. 115, 119, 131. The Court found the Acis witnesses' testimony "of questionable reliability and, oftentimes, there seemed to be an effort to convey plausible deniability." *Acis*, 584 B.R. at 131.

4. "[S]ince the arbitration award [in favor of Terry, the petitioning creditor], there has been a calculated effort (largely by Highland) to effectively liquidate the Alleged [Acis] Debtors." *Acis*, 584 B.R. at 148. The Court found the Alleged Debtors were "really out to protect –Highland and Highland-affiliates" in contravention of their fiduciary duties of loyalty. *Acis*, 584 B.R. at 149.

5. In addition to finding breaches of fiduciary duty when Highland promoted its self-interests over those of Acis creditors, the Court found "evidence of both intentional and constructive fraudulent transfers." *In re Acis Capital Mgmt., L.P.*, 2019 WL 417149, at *11 (confirmation opinion also referencing "actual intent to hinder, delay, or defraud").

6. After the Court directed the appointment of the Acis chapter 11 trustee, the chapter 11 trustee found service providers unrelated to Highland entities. These providers were cheaper and decreased conflicts.

*The following section is redacted to honor the interim sealing order. The United States
Trustee has simultaneously filed an objection to the motion to seal.*



A series of 15 horizontal black bars of varying lengths, arranged vertically. The bars are composed of a fine, stippled pattern. Some bars contain small white markers: the first bar has a short vertical line; the second bar has a short horizontal line; the third bar has a short vertical line; the fourth bar has a small black square; the fifth bar has a small black square and a short vertical line; the sixth bar has a short vertical line; the seventh bar has a small black square; the eighth bar has a short vertical line; the ninth bar has a small black square; the tenth bar has a short vertical line; the eleventh bar has a short horizontal line; the twelfth bar has a short vertical line; the thirteenth bar has a short horizontal line; the fourteenth bar has a short vertical line; and the fifteenth bar has a short horizontal line.

Prior Efforts to Cabin Highland Capital Management's Self-Dealing and Other Willful and Intentional Acts Have Failed.

14. Highland has been found to engage in self-dealing and other misconduct for years. The prior efforts to remediate and change the culture have failed.

15. In 2014, the SEC determined that Highland had historically engaged in multiple transactions in its client advisory accounts without disclosing that Highland was acting as principal or obtaining client consent before the trades were completed. The SEC required

Highland to retain an outside compliance consultant and to implement that consultant's recommendations.

16. [REDACTED]

17. Cumulatively, the findings of this Court and other tribunals establish that the problems exist in the management culture at Highland. These problems go beyond the officers and directors.

18. The general partner of Highland is controlled by Dondero.

19. Moreover, the integrated nature of the board for Highland-related entities allows for the possibility that individuals removed from the board and from management may still monitor the financial transactions and use their relationships with the Highland's employees to direct outcomes. For example, Highland proposes to bank, in part, with NexBank. The NexBank website reflects that Dondero chairs the board and Okada is a director. Similarly, Highland Management, the debtor, has intercompany transactions with Highland Capital Management Korea Limited, Highland Capital Management Latin America, L.P., and Highland Capital Management (Singapore) Pte Ltd.

Legal Analysis and Argument

20. The United States Trustee is charged with monitoring the federal bankruptcy system.

See 28 U.S.C. § 586(a)(3); see also United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.) 33 F.3d 294, 295-96 (3d Cir. 1994).

21. Before confirmation, the Court "shall order the appointment of a trustee . . . for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar

cause.” 11 U.S.C. §1104(a)(1) (emphasis added). In addition, by adding appointment of a trustee as a remedy in section 1112, “cause” also may be factors traditionally resulting in dismissal or conversion. 11 U.S.C. §1112(b)(1). Here, an additional factor is “bad faith.” Alternatively, the Court must appoint a trustee “if such appointment is in the interest of the creditors, any equity security holders, and other interests of the estate.” 11 U.S.C. § 1104(a)(2).

22. The Fifth Circuit has indicated that the burden of proof for the appointment of a trustee is “clear and convincing” evidence, but the Court later adopted the dissent’s opinion. *Cajun Elec. Co. v. Louisiana Elec. Co. (In re Cajun Electric Power Co-Op, Inc.)*, 69 F.3d 746, on reh’g, 74 F.3d 599 (5th Cir. 1996) (adopting dissent).¹

23. The duties of a trustee are defined in section 1106, and the Court has the ability to tailor some of them. 11 U.S.C. § 1106(a).

24. The “cause” to appoint an examiner or a trustee may be a reason other than the enumerated factors. *Oklahoma Ref. Co. v. Blaik (In re Oklahoma Ref. Co.)*, 838 F.2d 1133, 1136 (10th Cir. 1988); *cf. Little Creek Dev. Corp. v. Commonwealth Mortg. Corp. (In re Little Creek Dev. Corp.)*, 779 F.2d 1068, 1072 (5th Cir. 1986) (defining “cause” in context of dismissal statute).

25. For example, courts have appointed trustees or examiners when the debtor’s insiders have conflicts of interest arising from the sale of the Debtor’s assets. In *Cajun Electric*, the Fifth Circuit affirmed the appointment of a trustee, in part, because the co-operative members

¹ In *Grogan v. Garner*, the United States Supreme Court held that the burden of proof for dischargeability fraud actions was preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991). In reaching this holding, the Supreme Court cataloged both bankruptcy and non-bankruptcy fraud statutes and held that Congress generally imposed a preponderance standard for fraud in civil proceedings.

were interested in purchasing part or all of Cajun Electric's assets. *Cajun Elec. Power Cooperative, Inc. v. Central Louisiana Elec. Co., Inc. (In re Cajun Elec. Power Cooperative, Inc.)*, 69 F.3d 746, 751 (5th Cir. 1995) (Garza, J., dissenting), *adopted as majority opinion on reh'g*, 74 F.3d 599 (5th Cir. 1996). The Fifth Circuit held that "a trustee may be the only effective way to pursue reorganization" when the management has cross-purposes. *Cajun Elec.*, 69 F.2d at 751.

Cause exists to appoint a chapter 11 trustee:

26. Here, both express statutory standards and the common law case standards for "cause" exist. Specifically, "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor" and bad faith exist under the facts of this case.²

27. The record regarding a series of self-dealing categories reflects both incompetence and gross mismanagement. *SEC Judgment*, pp. 5-7.

28. Other "cause" exists to appoint a trustee because tribunals have historically found the management's testimony unreliable and the Debtor's actions as reflecting willfulness and intent. This Court has found that the Debtor's management had fraudulent intent when it removed assets from Acis.

It is in the best interests of creditors to appoint a chapter 11 trustee.

29. Appointment of chapter 11 trustee is also in the interests of creditors, equity security holders, and other interests of the estate. The Court should direct the appointment of a chapter 11 trustee to serve the "interests of creditors, any equity security holders, and other interests of the estate." 11 U.S.C. §1104(a)(2).

² "The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive officer . . . participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting." 11 U.S.C. §1104(e).

30. First, it is in the best interest of the creditors to have an independent trustee to assume control over the estate in order to evaluate any alter ego claims, avoidance actions, and other tort claims.

31. Second, it is in the best interest of the creditors and other parties-in-interest to have accurate financial information. Accurate financial information ensures parties understand the facts of the case and avoids post-petition liabilities for violations. Like the information provided to investors in securities filings, the information provided in a bankruptcy case depends on affirmative disclosure.

32. Other efforts to check or monitor the Debtor's management have failed. The Acis trustee's actions reflect a need to be able to bid competing services and replace related-entities when conflicts of interest or cost concerns arise.

33. Congress has defined the remedy for the facts of this case. "The court shall order the appointment of a trustee." 11 U.S.C. § 1104(a).

Conclusion

For the foregoing reasons, the United States Trustee requests the Court to

- a order the United States Trustee to appoint a Chapter 11 Trustee; or
- b grant to the United States Trustee such other and further relief as is just and proper.

Dated: December 23, 2019

Respectfully Submitted,
WILLIAM T. NEARY
UNITED STATES TRUSTEE

/s/ Lisa L. Lambert

Lisa L. Lambert
Asst. U.S. Trustee, TX 11844250 (and NY)
Office of the United States Trustee
1100 Commerce St. Room 976
Dallas, Texas 75242
(214) 767-1080
Lisa.L.Lambert@usdoj.gov

Certificate of Service

I certify that on December 23, 2019, I sent copies of the foregoing document on to the attached service lists by first class United States mail and by ECF notification to those listed below.

/s/ Lisa L. Lambert
Lisa L. Lambert

Highland Capital Management

300 Crescent Court
Suite 700
Dallas, TX 75201

Kurtzman Carson Consultants

Joe Morrow
222 N. Pacific Coast Hwy Ste 300
El Segundo, CA 90245

Pachulski Stang Ziehl & Jones LLP

John A. Morris and Gregory V. Demo

780 Third Avenue, 34th Floor
New York, NY 10017-2024

Blank Rome LLP

John E. Lucian, Josef W. Mintz
1201 N. Market Street, Suite 800
Wilmington, DE 19801

Cole, Schotz, Meisel, Forman & Leonard,

P.A.

Michael D. Warner, Esq.
301 Commerce Street, Suite 1700
Fort Worth, TX 76102

Dentons US LLP

Lauren Macksoud, Esq.
1221 Avenue of the Americas
New York, NY 10020-1089

Frost Brown Todd LLC

Mark A. Platt
100 Crescent Court, Suite 350
Dallas, TX 75201

Hunter Mountain Investment Trust

c/o Rand Advisors LLC
John Honis
87 Railroad Place Ste 403
Saratoga Springs, NY 12866

Internal Revenue Service

Centralized Insolvency Operation
2970 Market St
Philadelphia, PA 19104

Jefferies LLC

Office of the General Counsel
520 Madison Avenue, 16th Floor
Re: Prime Brokerage Services
New York, NY 10022

Pachulski Stang Ziehl & Jones LLP

Richard M. Pachulski, Jeffrey N. Pomerantz,
Ira D. Kharasch, Maxim B. Litvak, James E.
O'Neill
919 North Market Street
17th Floor
Wilmington, DE 19801

Hayward & Associates PLLC

Melissa S. Hayward, Zachery Z. Annable
10501 N. Central Expy, Ste. 106
Dallas, TX 75231

Ashby & Geddes, P.A.

William P. Bowden, Esq., Michael D.
DeBaecke, Esq.
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899-1150

Carlyon Cica Chtd.

Candace C. Carlyon, Esq., Tracy M. Osteen,
Esq.
265 E. Warm Springs Road, Suite 107
Las Vegas, NV 89119

Condon Tobin Sladek Thornton PLLC

J. Seth Moore
8080 Park Lane, Suite 700
Dallas, TX 75231

Dentons US LLP

Patrick C. Maxcy, Esq.
233 South Wacker Drive
Suite 5900
Chicago, IL 60606-6361

Gibson, Dunn & Crutcher LLP

Marshall R. King, Esq., Michael A. Rosenthal,
Esq. & Alan Moskowitz, Esq.
200 Park Avenue
New York, NY 10066

Internal Revenue Service

Attn Susanne Larson
31 Hopkins Plz Rm 1150
Baltimore, MD 21201

Jackson Walker L.L.P.

Michael S. Held
2323 Ross Avenue, Suite 600
Dallas, TX 75201

Jenner & Block LLP

Marc B. Hankin, Richard Levin
919 Third Avenue
New York, NY 10022-3908

Pachulski Stang Ziehl & Jones LLP

Richard M. Pachulski, Jeffrey N. Pomerantz,
Ira D. Kharasch, Maxim B. Litvak, James E.
O'Neill
10100 Santa Monica Blvd, 13th Floor
Los Angeles, CA 90067

Pachulski Stang Ziehl & Jones LLP

Maxim B. Litvak
150 California Street, 15th Floor
San Francisco, CA 94111-4500

BBVA

Michael Doran
8080 North Central Expressway
Suite 1500
Dallas, TX 75206

Chipman, Brown, Cicero & Cole, LLP

Mark L. Desgroselliers
Hercules Plaza
1313 North Market Street, Suite 5400
Wilmington, DE 19801

Cross & Simon LLC

Michael L. Vild, Esquire
1105 N. Market Street, Suite 901
Wilmington, DE 19801

Frontier State Bank

Attn: Steve Elliot
5100 South I-35 Service Road
Oklahoma City, OK 73129

Gibson, Dunn & Crutcher LLP

Matthew G. Bouslog, Esq.
3161 Michelson Drive
Irvine, CA 92612

Internal Revenue Service

Centralized Insolvency Operation
PO Box 7346
Philadelphia, PA 19101-7346

Jefferies LLC

Director of Compliance
520 Madison Avenue, 16th Floor
Re: Prime Brokerage Services
New York, NY 10022

Kane Russell Coleman Logan PC

John J. Kane
901 Main Street, Suite 5200
Dallas, TX 75242-1699

KeyBank National Association
as Administrative Agent
225 Franklin Street, 18th Floor
Boston, MA 02110

KeyBank National Association
as Agent
127 Public Square
Cleveland, OH 44114

Kurtzman Steady, LLC
Jeffrey Kurtzman, Esq.
401 S. 2nd Street, Suite 200
Philadelphia, PA 19147

Latham & Watkins LLP
Asif Attarwala
330 N. Wabash Avenue, Ste. 2800
Chicago, IL 60611

Latham & Watkins LLP
Jeffrey E. Bjork
355 South Grand Avenue, Ste. 100
Los Angeles, CA 90071

Linebarger Goggan Blair & Sampson LLP
Elizabeth Weller, Laurie A. Spindler
2777 N. Stemmons Freeway
Suite 1000
Dallas, TX 75207

Lynn Pinker Cox & Hurst, L.L.P.
Michael K. Hurst, Esq.
2100 Ross Avenue, Ste 2700
Dallas, TX 75201

Mark K. Okada
300 Crescent Court
Suite 700
Dallas, TX 75201

Morris, Nichols, Arsh & Tunnell LLP
Curtis S. Miller, Kevin M. Coen
1201 North Market Street, Suite 1600
Wilmington, DE 19801

Morrison Cohen LLP
Joseph T. Moldovan, Esq. & Sally Siconolfi,
Esq.
909 Third Avenue
New York, NY 10022

NexBank
John Danilowicz
2515 McKinney Ave
Ste 1100
Dallas, TX 75201

Nixon Peabody LLP
Louis J. Cisz, III, Esq.
One Embarcadero Center, 32nd Floor
San Francisco, CA 94111

Office of General Counsel
Securities & Exchange Commission
100 F St NE
Washington, DC 20554

Office of the Attorney General
Ken Paxton
300 W. 15th Street
Austin, DE 78701

Office of the Attorney General
Main Justice Building, Room 5111
10th & Constitution Avenue, N.W.
Washington, DC 20530

Office of the United States Attorney
Erin Nealy Cox, Esquire
1100 Commerce Street, 3rd Floor
Dallas, TX 75202

Office of the United States Trustee
Lisa L. Lambert, Esquire
1100 Commerce Street, Room 976
Earle Cabell Federal Building
Dallas, TX 75242

Pension Benefit Guaranty Corporation
Michael I. Baird
Office of the General Counsel
1200 K Street, N.W.
Washington, DC 20005-4026

**Perdue, Brandon, Fielder, Collins & Mott,
L.L.P.**
Linda D. Reece
1919 S. Shiloh Rd., Suite 310
Garland, TX 75042

Potter Anderson & Corroon LLP
Jeremy W. Ryan, Esq., R. Stephen McNeill,
Esq. & D. Ryan Slaugh, Esq.
1313 North Market Street, 6th Floor
Wilmington, DE 19801

Prime Brokerage Services
Jefferies LLC
520 Madison Avenue
New York, NY 10022

Pronske & Kathman, P.C.
Jason P. Kathman
2701 Dallas Parkway, Suite 590
Plano, TX 75093

Richards, Layton & Finger PA
Michael J. Merchant, Sarah E. Silveira
One Rodney Square
920 North King Street
Wilmington, DE 19801

Schulte Roth & Zabel LLP
James T. Bentley
919 Third Avenue
New York, NY 10022

Securities & Exchange Commission
Andrew Calamari, Regional Director
New York Regional Office
Brookfield Place, Suite 400
200 Vesey Street
New York, NY 10281

Securities & Exchange Commission
Sharon Binger, Regional Director
Philadelphia Regional Office
One Penn Center, Suite 520
1617 JFK Boulevard
Philadelphia, PA 19103

Sidley Austin LLP
Bojan Guzina, Matthew Clemente, Alyssa
Russell, Elliot A. Bromagen
One South Dearborn Street
Chicago, IL 60603

Sidley Austin LLP
Jessica Boelter
787 Seventh Avenue
New York, NY 10019

Sidley Austin LLP
Lee S. Attanasio, Esq.
787 Seventh Avenue
New York, NY 10019

Sidley Austin LLP
Penny P. Reid, Paige Holden Montgomery,
Charles M. Person, Juliana Hoffman
2021 McKinney Avenue Suite 2000
Dallas, TX 75201

State Comptroller of Public Accounts

Revenue Accounting Division-
Bankruptcy Section
P.O. Box 13258
Austin, TX 78711

State of Delaware

Division of Corporations - Franchise Tax
401 Federal Street
PO Box 898
Dover, DE 19903

Strand Advisors, Inc.

300 Crescent Court
Suite 700
Dallas, TX 75201

Sullivan Hazeltine Allinson LLC

William A. Hazeltine, Esq.
901 North Market Street, Suite 1300
Wilmington, DE 19801

Texas Attorney General's Office

Bankruptcy-Collections Division
P.O. Box 12548
Austin, TX 78711-2548

The Dugaboy Investment Trust

300 Crescent Court
Suite 700
Dallas, TX 75201

The Mark and Pamela Okada Family Trust -

Exempt Trust #1
300 Crescent Court
Suite 700
Dallas, TX 75201

The Mark and Pamela Okada Family Trust -

Exempt Trust #2
300 Crescent Court
Suite 700
Dallas, TX 75201

U.S. Department of the Treasury

Office of General Counsel
1500 Pennsylvania Avenue, NW
Washington, DC 20220

United States Attorney General

U.S. Department of Justice
William Barr, Esquire
950 Pennsylvania Avenue, NW,
Room 4400
Washington, DC 20530-0001

Winstead PC

Rakhee V. Patel, Phillip Lamberson
2728 N. Harwood Street, Suite 500
Dallas, TX 75201

Young Conaway Stargatt & Taylor, LLP

Michael R. Nestor, Edmon L. Morton, Sean M.
Beach, Esq., Jaclyn C. Weissgerber, Esq.
Rodney Square
1000 North King Street
Wilmington, DE 19801

Zillah A. Frampton

Bankruptcy Administrator
Delaware Division of Revenue
Carvel State Office Building, 8th Floor
820 N. French Street
Wilmington, DE 19801